

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

77-1279

To be argued by
PAUL WINDELS, JR.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

ROBERT A. GUBELMAN, SR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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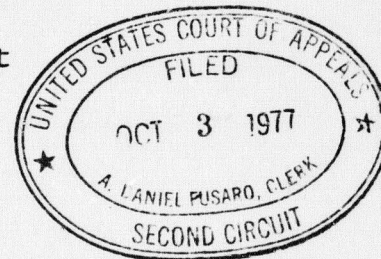


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UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

DOCKET NO. 77-1279

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
- against -
ROBERT A. GUBELMAN, SR.,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT ROBERT A. GUBELMAN, SR.
(who will be referred to herein as "Defendant")

ISSUE PRESENTED FOR REVIEW

The issue which is raised on this appeal concerns the introduction by the Government and admission by the Trial Court, in a criminal case and over the objection of Defendant, of testimony as to so-called "similar acts" by Defendant to those for which he was being tried. Was the evidence within the scope of Rule 404(b) of the Federal Rules of Evidence? Was it unduly prejudicial as proscribed by Rule 403 of those Rules?

STATEMENT

Appeal is taken from the judgment of conviction of Defendant entered in the United States District Court for the Southern District of New York on May 11, 1977, by the Honorable Irving Ben Cooper upon conviction following a jury trial. Defendant was sentenced by Judge Cooper to two years concurrent imprisonment on the two Counts of the superseding indictment, which charged that he accepted money and other things of value as a Government meat inspector in violation of 21 U.S.C. §622. (Originally, the superseding indictment contained three counts. The Second Count was severed at the time of trial, and later dismissed.) Defendant has remained free on his own recognizance pending appeal.

Counsel was appointed to represent Defendant on this appeal pursuant to the Criminal Justice Act by Order of this Court dated June 28, 1977.

FACTS

Defendant was appointed a food inspector of the Department of Agriculture, Animal and Poultry Division, on January 21, 1971 (Tr. 317).^{*} His duties as a food inspector entailed entering plants subject to Federal inspection in order to observe the sanitary conditions and check the wholesomeness and condition of the food product (Tr. 326).

^{*} "Tr." refers to the transcript of the trial in this action. "317" refers to the pertinent page of that transcript. The transcript of the trial from April 12 through April 18, 1977; and related proceedings on May 11, 23, and 25, 1977, have been docketed, and made a part of the Record on Appeal.

On November 9, 1976, a three-count indictment was filed in the Southern District of New York charging that Defendant did unlawfully, willfully and knowingly receive and accept from certain companies money "and other things of value" in violation of 21 U.S.C. § 622 (A-3-5). Subsequently, on March 10, 1977, the following superseding indictment was filed:

COUNT ONE

* * *

During the approximate time periods listed below, in the Southern District of New York, the defendant ROBERT A. GUBELMAN, SR. unlawfully, wilfully and knowingly did receive and accept from Master Purveyors, Inc. money and other things of value, that is, approximately \$25 weekly:

Approximate Time Periods

August 20 through November 25, 1972

December 10, 1972 through January 6, 1973.

(Title 21, United States Code, Section 622.)

COUNT TWO

* * *

During the approximate time periods listed below, in the Southern District of New York, the defendant ROBERT A. GUBELMAN, SR. unlawfully, wilfully and knowingly did receive and accept from the Western Meat Company, Inc. money and other things of value, that is, approximately \$20 weekly:

Approximate Time Periods

April 23 and April 24, 1973

June 7 and June 8, 1973

October 1, 2 and 5, 1973

November 27 through November 30, 1973.

(Title 21, United States Code, Section 622.)

COUNT THREE

* * *

During the approximate time periods listed below, in the Southern District of New York, the defendant ROBE T A. GUBELMAN, SR. unlawfully, willfully and knowingly did receive and accept from Plaut & Stern, Inc. money and other things of value, that is, approximately \$25 weekly:

Approximate Time Periods

April 17 through April 20, 1973

May 1 through May 12, 1973

September 2 through September 15, 1973

November 27 through November 30, 1973

(Title 21, United States Code, Section 622.)"

21 U.S.C. § 622, "Bribery of or gifts to inspectors or other officers and acceptance of gifts," provides:

"*** any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this subchapter who shall accept any money, gift, or other thing of value from any person, firm, or corporation, or officers agents or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm or corporation engaged in commerce any gift, money, or other thing of value, given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than \$1,000 nor more than \$10,000 and by imprisonment not less than one year nor more than three years."

Defendant pleaded not guilty to this indictment, and trial commenced before Judge Cooper and a jury on April 12, 1977, and concluded April 18 1977. Count Two, charging unlawful activities by Defendant concerning Western Meat Company, Inc., was severed on the Government's motion at the start of trial, and was later dismissed. Count Three then became Count Two. For the purposes of this appeal, however, the pertinent Counts will be referred to by their original numbers, One and Three.

THE GOVERNMENT'S DIRECT CASE

The Government's direct case against Defendant consisted of the testimony of five witnesses. The first, George Puchta, acting area supervisor for the United States Department of Agriculture Meat and Poultry Inspection Program, testified generally as to the meat and poultry inspection program under the Federal Meat Inspection Act of 1967. He also identified a number of Government documents relating to Defendant's various assignments which were subsequently introduced into evidence.

The next two witnesses against Defendant were Sam Solasz, the President of Master Purveyors, Inc., and Harry Langsam, President of Plaut & Stern, Inc., the companies specified in Counts One and Three, respectively, of the superseding indictment (A-7-8). Both of these witnesses had received letters of personal immunity from the Government, although guilty pleas respecting the particular transactions had been

entered in other proceedings on behalf of their companies (Tr. 100, GX 14; Tr. 196; GX 15).*

Mr. Solasz testified to the effect that Defendant had been the meat inspector at Master Purveyors, Inc. at the end of 1972 (Tr. 78). According to Mr. Solasz, during the second week Defendant was at his plant, there were instances when because of Defendant's absence from the plant for a few hours, Mr. Solasz was unable to load any meat or do any work. At the end of the second week, Mr. Solasz testified Defendant asked him whether he had "made up his mind," and demanded a "fee" of \$25, which Mr. Solasz paid. According to Mr. Solasz, "I was giving \$25 every Friday" (Tr. 82).

In another incident, during the first week Defendant was at his plant, according to Mr. Solasz, Defendant told him that there was too much condensation on the ceiling of part of the plant, caused by steam from a knife sterilizer. Defendant then allegedly roped off "the whole side" of the work area and forbade work in that area unless the repair was made immediately. Mr. Solasz had requested "a couple of days" to fix the condition (Tr. 84-86). Mr. Solasz went to a Department of Agriculture supervisor who spoke to Defendant who then removed the "tag" he had put up at the roped-off area forbidding work (Tr. 87-88).

* "GX" refers to a Government Exhibit at the trial, followed by the number of that Exhibit.

According to Mr. Solasz, Defendant was the inspector at Master Purveyors, Inc. for three or four months at the end of 1972, but he could not recall the dates or the months (Tr. 91). From the third week on, according to Mr. Solasz, he did not have further conversations about the sanitary conditions at the plant with Defendant (Tr. 93). The witness stated he gave Defendant \$25 about eight or ten times, and \$50 about six or eight times (Tr. 99).

In response to the Assistant United States Attorney's questions, Mr. Solasz stated that he had been told that he would not be prosecuted for giving money to Defendant, and that he had entered a plea of guilty on behalf of Master Purveyors, Inc. (Tr. 100-101).*

Mr. Solasz admitted on cross-examination that he could not remember the names of any of the Federal inspectors who had been assigned to his plant in 1968 through 1972, except for Defendant, whose name he said he had obtained by looking up the "records" (Tr. 125-126).

Mr. Solasz insisted that he could not open his plant

* GX 14 contains an information in United States of America v. Master Purveyors, Inc., charging that Master Purveyors from about January 1969 through July 1975 "unlawfully, willfully and knowingly did pay, make contributions to and supplement" the salaries of a number of listed federal meat inspectors, including Defendant. On April 6, 1977 Master Purveyors, Inc., through its President, Mr. Solasz, had pleaded guilty to that information (GX 14).

to work in the morning unless the Federal Inspector was present (Tr. 128-130).*

The third witness for the Government, Harry Langsam, testified that Defendant was the federal inspector at Plaut & Stern's plant sometime in 1973, although not for a full "tour of duty" (Tr. 185).** Mr. Langsam was unable to recall whether it was the beginning, middle or end of 1973 when Defendant served as his inspector (Tr. 186).

Mr. Langsam testified that at the end of the first week Defendant was on the job he told Langsam "I'm leaving. Pay off" (Tr. 188). Langsam claimed he gave Defendant "\$20 or \$25" (Tr. 189). In all, Mr. Langsam said he gave Defendant \$20 or \$25 on four or five separate occasions (Tr. 195). Mr. Langsam said that while he personally had not been prosecuted for giving money to Defendant, his company, Plaut & Stern, had pleaded guilty to a misdemeanor (Tr. 196; GX 15).

On cross-examination Mr. Langsam admitted that Defendant did not "bother" him (Tr. 211).

Mr. Langsam also admitted on cross examination that he had paid money to "quite a few" federal inspectors, and gave estimates of his cash payments to six such inspectors (Tr. 222-228).

* Subsequent testimony by witness Harry Langsam, president of Plaut & Stern contradicted this assertion (Tr. 210; Tr. 234), which was an important part of Mr. Solasz' account of how Defendant had coerced him to make payments.

** A "tour of duty" is usually four months.

TESTIMONY AS TO SIMILAR ACTS

The Government then produced two witnesses, Herman Lustgarten and Alfred Rosenman, who testified as to "similar acts" over strong and specific objections of Defendants' trial counsel.

Herman Lustgarten, who had been plant manager at S.J. Schaffer during 1973 through 1975, stated that Defendant had been an inspector at the S.J. Schaffer plant at some time, but he did not recall the year. He did recall, however, giving Defendant \$10 per week during Defendant's tour of duty at S.J. Schaffer. Not only did Mr. Lustgarten not recall the year of the alleged payments, but in addition he did not remember whether Defendant had spent a full four month tour of duty at the plant (Tr. 246-247). As was the case with the previous witnesses, Solasz and Langsam, Mr. Lustgarten had been told he would not be personally prosecuted for giving money to Defendant, and he had executed an agreement to that effect with the Government (Tr. 249; GX 18).

Alfred Rosenman testified that he was the vice-president of Consolidated Beef Co., Inc., a meat-boning business in Jamaica, Queens (Tr. 255). He stated that Defendant had been a federal meat inspector at Consolidated Beef at some point, "might be '74, '75," but he did not recall the specific months (Tr. 257). The total duration of Defendant's assignment at Consolidated Beef was only three weeks, according to the witness' testimony (Tr. 257). According to Mr. Rosenman, Defendant "gave us trouble...he said, 'this is no good, that's

no good,' and he said, 'How much, what do I get?'" (Tr. 259). Mr. Rosenman testified to paying \$5 per day during the Defendants' stay at the plant (Tr. 259). The total payments amounted to about \$50 or \$60 (Tr. 259). The "trouble" Mr. Rosenman had referred to occurred when Defendant said "'The yard is not clean enough, the dressing room has papers and things there, I will close up the plant'" (Tr. 261).* On another occasion, Mr. Rosenman testified, Defendant told the people at Consolidated Beef "'clean the hooks'", and they cleaned the hooks (Tr. 261). This witness had also been promised personal immunity, by the United States Attorney's Office for the Eastern District of New York, although the corporation had entered a guilty plea to a one-count information (Tr. 263; GX 16; GX 17).**

DEFENDANT'S CASE

The Defendant elected to take the stand and testify on his own behalf. He stated that he had performed his duties as a Food Inspector at Master Purveyors and Plaut & Stern, and denied that he had had occasion to stop the operations at either of those plants for any reason whatsoever (Tr. 326).

* On his cross-examination by the Assistant United States Attorney, Defendant said he did not recall having conversations with Mr. Rosenman during his tour of Consolidated Beef. (Tr. 359).

** Since neither "similar act" witness had any recollection of the dates of the alleged acts, the first trial witness, George Puchta, the Meat and Poultry Inspection Program Acting Area Supervisor was recalled to identify certain Government Exhibits showing Defendant worked at the Consolidated Beef plant on certain dates in 1974 and 1975, and at S.J. Schaffer on certain dates in 1973 (Tr. 274).

(Mr. Solasz had earlier claimed Defendant had shut down operations at Master Purveyors in a dispute over a sterilizer [Tr. 86]). Furthermore, according to Defendant:

"If there were an unsanitary condition in the plant it is in a particular area the area would be rejected for use. There would be what was referred to earlier during the trial as a retain or reject tag that would be tied to a particular area." [Emphasis added] (Tr. 327)

In addition Defendant testified that his copy of his time and attendance sheets for 1972 did not show any time during his tour of duty at Master Purveyors when he was not present at that plant at 5 A.M. (Tr. 331; DX J).^{*} This contradicted another one of Mr. Solasz' claims of harassment which had resulted in his making payments to the Defendant--his contention that Defendant delayed the start of operations of the plant one day by failing to appear until 6:30 in the morning (Tr. 81). In any event, Defendant stated, a plant could operate if an inspector was late or not present at opening time (Tr. 331).

Furthermore, Defendant contended that while he was assigned to inspect Master Purveyors, he never had occasion to converse with Mr. Solasz regarding any condition existing in the plant (Tr. 335). He did, however, at some point speak to "a fellow by the name of Misha" about an unsanitary condition, which he "gave him a reasonable time to have. . .corrected" (Tr. 335-336). As for Mr. Solasz, while Defendant had seen Mr. Solasz "shipping meat in and out" while he was on duty at

^{*} "DX" refers to a Defendants' Exhibit at the trial, followed by the letter of that Exhibit.

Master Purveyors, he did not speak to him at any time (Tr. 336). Defendant denied taking anything of value, money, meat or any other commodity of value (Tr. 336-337).

Similarly, Defendant denied taking any money, meat or anything of value during his tour of duty as a relief inspector at Plaut & Stern, the company covered by Count Three of the indictment (Tr. 344).

On cross-examination, the Assistant United States Attorney concentrated on Defendant's denials of having taken money or anything of value from any of the four witnesses, Solasz, Langsam, Lustgarten and Rosenman (Tr. 359-365). Defendant reiterated these denials, and stated that those witnesses had been lying (Tr. 362-363; Tr. 364). Defendant insisted that he had not taken any money, anything of value, or "anything" from any meat packer (Tr. 364-365). Defendant admitted under the Government's cross-examination that a "lugger" of Consolidated Beef had once put a package in his car, but insisted that the package did not contain meat, but merely bones for a dog (Tr. 366).*

On cross-examination of Defendant, the Assistant United States Attorney for the first time had brought up the name of Joseph Staiman, part owner of Western Meat Company (Tr.

* On redirect Defendant stated that the "package" contained two shank bones, approximately a foot long, which to his knowledge had no commercial value and were given away to anyone who wanted them (Tr. 370). At Consolidated Beef, he stated, there were a number of barrels of such bones, to which Defendant had seen many people help themselves (Tr. 370).

360). Western Meat Company had been mentioned in Count Two of the superseding indictment, the Count which was severed at the Government's request at the beginning of the trial, and which was later dismissed (Tr. 9; A-8).

Now the Assistant United States Attorney asked Defendant whether he had ever received cigars from Mr. Staiman, and Defendant agreed that he had sometimes asked for and received cigars from Mr. Staiman. On the other hand, Defendant pointed out, Mr. Staiman had asked for and had received cigars from Defendant (Tr. 366).*

On Defendant's behalf three character witnesses testified that they knew Defendant from the time he had served as an auxiliary police officer in the 106th Precinct (Tr. 313-314; Tr. 376-378; Tr. 380-381).

THE GOVERNMENT'S REBUTTAL WITNESSES

The Government called two rebuttal witnesses. The first was Joseph Staiman, who had previously been in business for thirty years with Western Meat Company, Inc. (Tr. 385). Mr. Staiman stated that he had given Defendant around 20 cigars, costing between \$.80 and \$1. each when Defendant was his inspector and "once in awhile" when Defendant was not his inspector (Tr. 386). Mr. Staiman said Defendant asked for the

* The Government's Attorney persisted in his question as to whether approximately 20 "expensive" cigars whose worth he estimated to be \$.80 or \$1. apiece was "something" of value (Tr. 367). Defendant, who stated he paid about \$.25 each for his cigars which Mr. Staiman accepted, stated he did not consider accepting another's cigar a "thing of value" (Tr. 367).

cigars, but they did not have any conversations when he gave Defendant those cigars (Tr. 387). Mr. Staiman denied accepting any cigars from Defendant (Tr. 387).

On cross-examination Mr. Staiman stated he did not remember whether until a few weeks before the Government had claimed that he gave \$20 per week to Defendant, and that he did not remember whether he ever gave Defendant money (Tr. 387-388). However, Mr. Staiman did remember Western Meats pleading guilty, and that he was given a letter of immunity (Tr. 388-389; GX 21).

Upon redirect question by the Assistant United States Attorney, Mr. Staiman stated that he had in September, 1976 told the Assistant that he had paid money to a number of Federal meat inspectors, including Defendant, but that he had recently told the Assistant United States Attorney that "I don't remember and I will not lie." (Tr. 393-394).

Also in rebuttal, the Government presented Thomas V. St. Pierre, a supervisory special agent of the United States Department of Agriculture Office of Investigation. Agent St. Pierre testified as to his activities on May 30, 1975, exactly a year and a half after the last date enumerated in the Superseding Indictment, (Counts One and Three, Count Two having been dropped) (A-6-8). At that time Agent St. Pierre, after having been concealed in a van across the street from the Consolidated Beef parking lot in Jamaica, Queens, for seven and a half hours observed an individual enter the lot and put two packages in a vehicle identified by Agent St. Pierre as

Defendant's (Tr. 398-400). Defendant was observed to enter that vehicle about 30 minutes later, and drive away (Tr. 400). This rebuttal testimony pertained to the earlier testimony of Defendant on cross-examination when he admitted that a Consolidated Beef lugger had once put a package, which Defendant stated contained shank bones of no commercial value, into his vehicle (Tr. 370).

After deliberating, the Jury found Defendant guilty on both Counts of the superseding indictment.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED PREJUDICIAL, REVERSIBLE ERROR IN ADMITTING, OVER OBJECTION, TESTIMONY AS TO "SIMILAR ACTS"

Of the six Government substantive witnesses only two testified as to the acts charged in the indictment. The other four testified as to "similar acts."

Rule 404(b) of the Federal Rules of Evidence states as to the admission of evidence of so-called "similar acts" in a criminal trial:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In the trial below, Defendant only raised one issue and that is whether he had in fact accepted the bribes. There

was no question of motive, no question of opportunity, no question of intent, no question of preparation, no question of plan, no question of knowledge, no question of identity, and no question as to absence of mistake or accident. In short, if in fact he received the payments, he acknowledged guilt; he simply denied receiving the payments. As the Trial Court charged the jury:

"You must find that Mr. Gubelman accepted money from the person, firm or corporation, you must find that the defendant accepted the money in connection with or arising from his official duty. The purpose or intent with which the money was given and with which it was accepted is not relevant to a finding of guilt." (A-30; Tr. 523).

It thus appears that four out of six of the Government's substantive witnesses really established nothing more than that Defendant apparently had a proclivity for taking bribes and was acting "in conformity therewith" as to the offenses charged; and, accordingly, this sustained the credibility of the only two Government witnesses who each testified as to one of the two counts of the indictment on which Defendant was actually tried. Is testimony as to such traits of behavior in fact character testimony specifically prohibited by Rule 404(b)? That, in substance, we believe to be the question before the Court, one that must be decided based upon a consideration of the facts, with due regard to Rule 403 of the Federal Rules of Evidence which provides that:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The authorities in point seem to antecede the promulgation of Rule 404(b) in 1975. However that Rule apparently has codified the law as it was then expressed, at least in this Circuit. See Weinstein's Evidence, Vol. 2, ¶404[08], pp. 404-41-42; United States v. Gerry, 515 F.2d 130, 141 (2d Cir. 1975), cert. denied, 423 U.S. 832 (1975).

In determining whether or not the evidence of "similar acts or crimes" should be admitted, the Court must balance the danger of undue prejudice to the defendant as against the probative value of the evidence. See, United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967).

In United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970), defendants had been convicted of conspiracy to transport stolen works of art in interstate commerce, knowing the goods to have been stolen. The Court of Appeals reversed, and held that admission of evidence of a "similar act" of misconduct shortly before the particular conspiracy charged was error in that its prejudicial impact far exceeded its legitimate probative worth. The Court, while noting that evidence of the prior crime in this case was "indeed not irrelevant," held it was:

"inadmissible, however, because it unduly confuses the decision of the issue on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliquity of the accused [quoting United States v. Smith, 283 F.2d 760, 763 (2d Cir. 1960), cert. denied, 365 U.S. 851 (1961)].

"The rule which, despite the general rule, authorizes the admission into evidence of prior crimes similar in nature to the crime sought to be proved at trial authorizes it in order to prove knowledge, intent, or design. Therefore the evidence is compensatingly probative if the element of intent, etc. is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." 435 F.2d at 483. (emphasis supplied)

At the trial in DeCicco, Government's principal witness, Paul Parness, testified not only as to the circumstances under which the defendants acquired the stolen art which was specified in the indictment, but he also testified to the effect that on a prior occasion several of the defendants had dealt in stolen art to his knowledge. The Court in reversing the conviction below stated:

"This is not a case where, if one accepts Paul Parness's testimony at face value, the statements and acts of the defendants lead to equivocal inferences. Parness's story, if believed, leads ineluctably to the conclusion that the defendants knew what they were doing, for had any of the defendants admitted the acts testified to by Parness any claim that they were ignorant of the nature of the goods or their intended destination for sale to a prospective buyer would be patently incredible. Therefore, whatever probative value the prior crimes of DeCicco and Gregory Parness added to the prosecution's case on the issue of defendants' intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants, at least defendants DeCicco and Gregory Parness, were a continuing band of art treasury thieves and 'fencers.'" (435 F.2d at 484.)

The rule in DeCicco is, accordingly, that even though the evidence of other illegal transactions has probative value respecting the question of intent as to the transaction charged

in the indictment, if the prejudicial effect of such evidence outweighs the probative value the evidence must be rejected. In the case at hand, the evidence of other offenses not charged had no probative value as to intent because the Trial Judge specifically eliminated the question of intent in his charge to the jury. Then too the amount and impact of the "similar act" testimony far exceeded that of the direct testimony relating to the offenses charged. Can there be any doubt that under the DeCicco decision the conviction below must be reversed?

Another significant decision in this Circuit on the matter of "similar acts," which predated DeCicco is United States v. Byrd, 352 F.2d 570 (2d Cir. 1965). In Byrd, the defendant had been convicted below for accepting bribes as a tax auditor for the Internal Revenue Service. Testimony as to other instances in which he accepted bribes was admitted by the trial court. The Court of Appeals reversed on other grounds but took the opportunity to enunciate its attitude on the matter of "similar acts" testimony for guidance in the retrial. The Court concluded that the Government had offered that testimony as part of its main case "for the purpose of showing criminal intent." While recognizing that the admissibility of this kind of evidence is "a matter in which the trial judge should be allowed a wide range of discretion," the Court stated:

"The exercise of discretion must be addressed to a balancing of the probative value of the proffered evidence, on the one hand, against its prejudicial character, on the other. The probative value is measured by the extent to which the evidence of prior

criminal activities, other than a conviction, closely related in time and subject matter, tends to establish that the accused committed the criminal act charged in the indictment knowingly or with criminal intent or tends to negative the claim that the acts were committed innocently or through mistake or misunderstanding.

"It is generally recognized that there can be no complete assurance that the jury even under the best of instructions will strictly confine the use of this kind of evidence to the issue of knowledge and intent and wholly put out of their minds the implication that the accused, having committed the prior similar criminal act, probably committed the one with which he is actually charged. The court in its colloquy with defense counsel conceded that prejudice of this sort would result to Byrd in letting in the evidence.

"From the quality of proof standpoint for proving knowledge and intent, its probative value was largely cumulative.

* * *

"Another factor to be considered is whether the Government was faced with a real necessity which required it to offer the evidence in its main case. The defense had not, either in its claims or the statement of facts which it would seek to prove, 'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake. McCormick Evidence, § 157 at 331 (1954); Vol. 1 Wharton's Criminal Evidence, § 237 at 528 (12th ed. 1955). Nor did the Government suffer from a lack of evidence of intent. Kaufman's testimony relating to the first two counts furnished ample evidence of knowledge and intent, of the same kind and quality as that shown by his testimony concerning the Sandberg tax return. There was therefore no pressing necessity that evidence of that prior occasion be offered on the Government's main case. United States v. Ross, 321 F.2d 61, 67 (2d Cir. 1963)." [emphasis added] 352 F.2d at 574-575.

The Court observed that for the purposes of its discussion:

**** it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage may be held to be an abuse of discretion. Under such circumstances the better practice would be to sustain the objection to the offer on the Government's main case without prejudice to its re-offer in rebuttal, if then warranted." 352 F.2d at 575.

In a subsequent case, United States v. Deaton, 381 F.2d 114 (2d Cir. 1967), the Court of Appeals took pains to note that in the Byrd case "there was actually no holding" on the issue of whether it was an abuse of discretion for the trial judge to admit evidence of other crimes on the issue of criminal intent in the Government's main case. It was rather:

"in the course of suggesting guidelines for the retrial of that case, we discussed, p. 574, certain factors, apparently not fully heeded on the first trial, which should be considered, and pointed out that, where the probative value of evidence of another similar crime offered by the Government in its main case is slight and the prejudice is substantial, 'the better practice would be to sustain the objection to the offer * * * without prejudice to its reoffer in rebuttal, if then warranted.'" 381 F.2d at 118, f.n.3.

There have been two decisions by the First Circuit involving convictions of meat inspectors under 21 U.S.C. § 622 which should be mentioned although they are readily distinguishable.

In United States v. Seuss, 474 F.2d 385 (1st Cir.)
cert. denied, 412 U.S. 928 (1973), the defendant was convicted
of accepting money or other things of value in violation of
§ 622, and he was also convicted of conspiracy to defraud the
Government. Among his other claims, the defendant challenged
admission of proof of a number of similar illegal acts which
were said to have occurred before the relevant date set by the
statute of limitations. The Court of Appeals for the First
Circuit observed that the District Court had permitted evidence
of those acts to be introduced only to prove the nature and
continuity of the conspiracy (474 F.2d 391). The Court then
went on that since the indictment alleged a general conspiracy
to defraud the Government rather than a conspiracy to corrupt
his behavior only during the period of the alleged conspiracy
or to corrupt him only by payments at the time he was assigned
to a particular meat company, the evidence pertaining to both
1965 and 1967 was sufficient to allow the jury to infer that
there was one conspiracy, starting in 1965 and continuing into
1967. In addition, it was pointed out that there was a basis
of interrelation in that the transfers in 1967 could have been
inducement for misconduct in the future should defendant have
occasion to work again at the first plant. The First Circuit
made it clear that it was relying on the conspiracy charge in
the indictment, stating that admission of such evidence was
not erroneous "in the absence of any evidence indicating
defendant's withdrawal from the conspiracy" (474 F.2d at 391).

Defendant in the instant case, of course, was not charged with conspiracy.

In United States v. Murphy, 480 F.2d 256 (1st Cir.), cert. denied, 414 U.S. 912 (1973), a Federal meat inspector was convicted on ten counts of accepting bribes violating § 622, supra. On appeal, defendant asserted error in that the trial court in two instances admitted evidence of bribes not charged in the indictment. The Court of Appeals for the First Circuit noted that defendant had raised no objection during the trial, so it was necessary that the admission of the evidence as to the two uncharged instances on top of the ten which were charged meet the more exacting standard of "plain error" to warrant reversal. The Court stated in affirming the conviction:

"Mindful of the rule that evidence of offenses which are wholly independent of those charged is generally inadmissible * * * we note initially that the evidence in question might well have been admissible under exceptions to this rule either to show that defendant acted knowingly or willfully in accepting these payments or because it was 'so blended or connected with [the evidence of offenses] on trial. . . that proof of one incidentally involve[d] the other. . . ' * * * "

480 F.2d at 260.

In the case at hand, Defendant did object strenuously during the trial in which four of the six substantive witnesses testified exclusively as to uncharged, unconnected offenses; and, to repeat, the Trial Judge charged the jury that intent was not an issue.

As this Court has reiterated in United States v. Grady, 544 F.2d 598, 605 (2d Cir. 1976), "similar act"

testimony is only admissible within the discretion of the trial judge when it is "substantially relevant" for a purpose other than showing a defendant's criminal character or disposition, and further when the probative worth of such evidence outweighs its potential prejudicial impact. Here, there was no valid purpose for the "similar act" testimony. The Trial Judge by charging the jury that Defendant's intent was not an issue eliminated the last possible argument that it might be "substantially relevant," and we are left with the residue of truth that it was character testimony specifically excluded by Rule 404(b) and overwhelmingly prejudicial as further barred by Rule 403.

CONCLUSION

For the reasons stated above, the judgment of conviction herein should be reversed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Allen Quinton HAYES, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 162 Navy Walk
Brooklyn N.Y. 11201 Apt 6A.

That on the 3 day of OCTOBER, 1977,
deponent personally served the within BRIEF OF
DEFENDANT - APPELLANT
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed,~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

ROBERT B. FISKE, JR.
U.S. Attorney for the
Southern District of New York
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One St. Andrew's Plaza
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Sworn to before me this

3 day of October, 1977 Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979